



January 31, 2020

Submitted Electronically

CC:PA:LPD:PR (REG-107431-19)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice of Proposed Rulemaking, REG-107431-19, Treatment of Payments to Charitable Entities in Return for Consideration. Docket ID IRS-2019-0056.

Dear Sir/Madam:

The Association of Christian Schools International (ACSI) appreciates the opportunity to offer the following Public Comment regarding the proposed Treasury regulations referenced above.

Summary.

First, we can appreciate that very early in this particular regulatory process, the Department of the Treasury and the IRS recognized that the final rule published June 13, 2019 was too broad and responded by issuing guidance to narrow its application. The NPRM announced in December 2019, and on which we comment today, seeks to formalize that guidance as a regulation and is indeed the next logical step in the process.

In general, we feel this NPRM's seeking to narrow the negative impact and application of the final rule is a step in the right direction. However, while we can agree the safe harbor provisions in this NPRM are a step in the right direction, we remain concerned that they are not specific enough (discussed below).

The safe harbor provisions in the NPRM allow for businesses to claim a charitable gift to a state tax credit program as a deductible business expense. They also allow individuals to claim a charitable gift to a state tax credit program as a state and local tax (SALT) deduction, but only if the individual has not reached the \$10,000 cap on the deduction imposed by the Tax Cuts and Jobs Act (TCJA). The latter is a weakness in the safe harbor provisions: there is no exception for taxpayers at or above the \$10,000 cap on the SALT deduction. **At minimum, the final rule ought to include an exception in this case.**

In short, the NPRM is a commendable effort to narrow the impact of the June 2019 final rule, but it is missing an exception for donors at or above the SALT deduction cap.

Regulatory History and Purpose.

As ACSI has made clear throughout the regulatory processes, in official letters in response to requests for information, in public comment and public hearing testimony on the earlier final rule, and in other ways, our concern from the start is that the final rule asserted that the issue at hand was the challenge of state “workarounds” to avoid the cap on the SALT deduction imposed by the TCJA. But, applying the final rule to all tax credit programs impacts far more than the questionable ones presumably at issue.

ACSI’s concern has focused on state scholarship tax credit programs which pre-existed the SALT cap and thus are in no way implicated in workaround efforts. In fact, it can be presumed that no state tax credit program prior to the January 1, 2018 effective date of the SALT deduction cap was created as a workaround to the SALT cap and thus should not be a target of the final rule at all.

The intent of state tax credit scholarship programs is not to subvert federal tax law nor function as an arm of state government. The intent is to improve the life of a child and positively change their trajectory by providing access to schools that are a better fit for the student.

Across the country, nearly 272,000 low- to moderate-income students are in private schools as a result of these programs. A significant majority of programs are for families identified as low- to moderate-income and for students assigned a failing district school. These programs provide an option to families that would not otherwise exist.

State scholarship tax credit programs, in fact, are typically designed to serve low- and moderate-income families. They function through donors who receive a tax credit for charitable gifts they make to a scholarship granting organization (SGO) which distributes those funds in scholarships for needy families. Such programs serve as an important component of the Education Freedom efforts of the present Administration, equipping low-income families with the means to access the Education Freedom to choose the best education option for their child(ren).

The final rule reduces the value of charitable gifts for this worthy purpose and thus has and will have the predictable result of fewer gifts. Even the loss of one scholarship due to the final rule is not de minimis for the family involved. The NPRM has the advantage of restoring some measure of value to legitimate charitable gifts for purposes such as tax credit scholarships. But as discussed below, there are potentially better alternatives the Department could consider to achieve its purpose without implicating legitimate, pre-existing tax credit programs.

Consequences and Impact.

From its inception, the final rule has been overbroad. It was designed to address a specific concern, but instead implicates all unrelated programs in a way that harms those programs and leaves open the question of whether the initial concern has been resolved.

Rather than deal specifically with state-created tax credit programs designed as a way to get around the cap on the SALT deduction, the final rule applies to all state tax credit programs, including every state tax credit program created before the 2018 implementation of the TCJA which in no way could have been created to avoid a then non-existent cap on the SALT deduction.

The final rule's solution is to limit the value of the charitable deduction for *all* state tax credit programs, including worthy causes such as tax credit scholarship programs. The result is somewhat bizarre. On the one hand, gifts to longstanding legitimate charitable tax credit programs suddenly now have *reduced* value they have never before experienced. On the other hand, gifts to brand new programs seeking a benefit they never had and *designed specifically as a so-called "workaround" of the SALT deduction cap (and which sparked the need for a regulatory response in the first place)* thus retain a measure of value, albeit perhaps less than anticipated.

This fundamental flaw in the final rule means that state attempts to evade the SALT deduction cap still enjoy some measure of value (when arguably they should be disallowed entirely?) while legitimate state tax credit programs created for all other charitable purposes experience a reduction in the value of the charitable gift.

The final rule sends a message that the consequence for creating a workaround will be a lower benefit than its creators had hoped, but a benefit remains at the same time legitimate tax credit programs with genuinely charitable purposes experience a definitive loss in value of their longstanding charitable gifts.

Further, the present NPRM is a clear acknowledgement by the Department of the Treasury and the IRS of this cruel reality for the simple reason that it seeks to restore some of the value of the charitable deduction through the creation of safe harbors. To do so is certainly commendable and we support that in principle (with the exception noted above), but again, the broad brush approach of the final rule itself means the safe harbors are *also* restoring some measure of value for so-called charitable gifts to the very workaround programs designed to evade the SALT deduction cap that sparked the need for a final rule in the first place.

The public can appreciate the fact that the Department recognizes and attempts to resolve the damage of the overbroad final rule through the NPRM which narrows the impact of the final rule. It does so by restoring some part of the value of the deduction for a charitable gift by allowing deductions through other means. Nevertheless, as ACSI has argued respectfully throughout the regulatory process, the Department could instead *eliminate* the damage done by the very simple act of targeting only the offending state tax credit programs without lumping in all tax credit programs everywhere. It is reasonable to suggest, again, that the solution to a regulation that is far too broad in its application is to narrow the application only to the specific concern in question. The NPRM is a positive step, but not quite as narrowly tailored as it could or should be.

Potential Alternatives.

There are several ways both the NPRM and the final rule it seeks to improve could be more specific. The NPRM, in fact, could do a great deal of good, again, by attacking the specific problem at hand: state tax credit programs created solely as a means to turn state tax payments (which exceed the federal SALT deduction cap) into a federal charitable deduction. The following are some considerations. With respect, perhaps the tax professionals whose expertise at the Department is in this very area would find better ways to adapt the suggestions below in order to resolve the challenge.

1. One possible way to be specific is to **apply consequences only to Section 170(c)(1)** which applies to "a contribution or a gift to or for the use of –

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.”

A state-created entity that receives a gift in lieu of or for the purposes of paying state or local taxes is undeniably a gift “made for exclusively public purposes.” Application only to Section 170(c)(1) rather than the whole of Section 170(c) would target only entities involved in the questionable tactics at issue. Section 170(c) includes five different kinds of organizations, none of which are implicated in state workarounds of the SALT deduction cap.

Section 170(c)(1) is the only category tied to state and local government gifts. In order to appropriately limit revenue loss and avoid the unintended restrictions of scholarship grant programs, the final regulations could cross-reference Section 170(c)(1). **With this specific cross reference, the regulations would match the revenue loss concerns directly with state and local government gifts.** Other qualified donors, such as the scholarship tax credit donors would thus be unaffected, and successful and long-standing gifting structures would remain unaffected. If this change is implemented, it will correct the overly broad reach of the final regulations that was not addressed in these proposed regulations.

2. Or, the other side of that same coin: **make an exception for charitable organizations that are not affiliated with a government entity** and/or that agree not to direct contributions “for exclusively public purposes” such as paying a state and local tax.
3. Another approach to consider may be to **exclude Section 170(c)(2)** from regulation on this issue altogether. This section applies to entities “organized and operated exclusively for religious, charitable, scientific, literary, or education purposes...”. Thus, entities that operate for non-governmental purposes would not be hit by the restrictions on charitable deductions imposed by the final rule.
4. It might be wiser yet to consider exempting all four remaining types of entities rather than exempting only those in Section 170(c)(2) noted above. Section 170(c)(3) applies to a post or organization of war veterans; 170(c)(4) concerns fraternal societies; and, Section 170(c)(5) relates to cemetery companies.
5. Yet another possibility would be to **apply consequences only to the gifts themselves which are made for the purposes of paying a state or local tax** no matter to what entity the gift is made. The specific purpose of paying a state or local tax stands in stark contrast to gifts for the purpose of, for example, providing scholarships to a low-income child (or any number of other worthy causes *other than paying state taxes* for which states have created state tax credit programs).

Conclusion.

Fundamentally, the question to be answered is “what is the consequence for attempting to turn a *state* tax payment into a *federal* charitable deduction by means of a tax credit program and must that

consequence apply to *all* tax credit programs?” The final rule puts the consequences on *all* state tax credit programs. Commendably, the NPRM’s safe harbors ease the pain of those consequences, also on *all* state tax credit programs, whether legitimate (such as scholarship tax credits to help low-income families) or illegitimate (such as a “workaround” designed to pay state and local taxes as if they were a charitable gift). The NPRM at minimum still needs an exception for individual donors who exceed the SALT deduction cap.

Thank you for your consideration of these comments. It may be helpful to note that the Association of Christian Schools International (ACSI) is a nonprofit, non-denominational organization providing support services to nearly 24,000 Christian schools in over 90 countries. As the world’s largest association of Protestant schools, ACSI serves 2,500 Christian preschools, elementary, and secondary schools, and 90 post-secondary institutions in the United States alone. We are a leader in strengthening Christian schools and equipping Christian educators worldwide. ACSI accredits Protestant Pre-K – 12 schools, provides professional development and teacher certification, and offers its member-schools high-quality curricula, student testing and a wide range of student activities. Member-schools educate some 5.5 million children around the world.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. George Tryfiates". The signature is fluid and cursive, with a prominent initial "P." and a long, sweeping underline.

P. George Tryfiates
Director for Government Affairs